turn briefly. First, Koo said in evidence that he signed the note in his personal capacity. Thus he did not use the company's stamp. But this is not what appears on the note as he signed 'acting as managing director'. It must obviously mean that Koo was signing for the defendant company as para 1 of the note expressly states that the plaintiff agreed to purchase the property from Guo Enterprises (P) Ltd. Koo contended that he did not expressly sign 'for and on behalf' of the defendant company. I do not see any real difference between 'acting as managing director' and 'for and on behalf of the company'. In both instances, he would be acting for the defendant company. The absence of the company's stamp is quite immaterial.

Secondly, reliance was placed by the defendant company on certain communications exchanged between the parties' solicitors. On 15 May 1987, the plaintiff's then solicitors, Don Cheang & Co, telexed to the defendants' solicitors, Chan Loh & Partners, asking for the draft option as soon as possible. On 25 May 1987, the present solicitors for the plaintiff, Ramdas & Wong, telexed to Chan Loh & Partners asking for the sale and purchase agreement. On 26 May 1987, Chan Loh & Partners replied that they had no instructions to proceed with the sale of the property. Not that it matters, it would appear that this telex of 26 May 1987 was not brought to the attention of the solicitor in charge at Ramdas & Wong because on 3 June 1987 a telex was sent out by Ramdas & Wong stating 'we refer to our telex of 25 May 1987 to which we have had no reply' followed by a request to Chan Loh & Partners for the 'draft option without further delay'. Mr Chan submitted that the different documents requested by the plaintiff's solicitors, first a draft option, then a sale and purchase agreement, and then a draft option, show that there was really no binding arrangement concluded between the parties. I am unable to accept that submission. First, the document that this court is asked to construe is not the correspondence written subsequently between the solicitors for the parties but the note itself. Second, and more importantly, an option when exercised (and here there cannot be any doubt that the plaintiff would exercise the option when it is eventually prepared) would constitute the formal agreement between the parties as would be the case if the parties had instead prepared and executed a sale and purchase agreement. In short, either document would achieve the same result. In the context, it seems to me to be just a matter of label and cannot in any way materially alter what was concluded between the plaintiff and the defendant company by the execution of the note and the payment of the deposit.

Thirdly, and the final subsidiary point: does the note and/or the receipt sufficiently constitute a written memorandum? Of course, the written memorandum must contain all the material terms of the contract which have been expressly agreed upon. The omission of a single term is fatal. However, on the evidence I find that while the plaintiff and Koo had talked about completion date for the transaction, nothing definite was agreed upon and that they would leave that as a matter of details to be worked out by their solicitors. In my view, the note constitutes what is known as an open contract where the three essential elements are specified: names of the parties; description of the property; and the price.

In the result, I grant an order in terms of prayer 1 of the originating summons with costs to the plaintiff. I also order that the parties and their solicitors work out a draft agreement to be formally executed by the parties within 14 days. In view of what I have decided herein, I make no order on the Originating Summons No 978/87 taken out by the defendant company against the plaintiff to determine the very same issue and fix costs for that originating summons at $1,000.

Order accordingly.

Solicitors: *Ramdas & Wong*; *Chan Loh & Partners*.

Reported by *Terence Tan Bian Chye*

Bangkok Bank Ltd v Cheng Lip Kwong

HIGH COURT (SINGAPORE) — SUIT NO 5186 OF 1986
YONG PUNG HOW J
7 DECEMBER 1989

Banking — Guarantee — 'Conclusive evidence' clause, effect of

Words and Phrases — 'For the time being'

The plaintiffs are a bank incorporated in Thailand and having a place of business in Singapore. By a guarantee in writing ('the guarantee'), the defendant and two others severally guaranteed the payment of any outstanding liability due to the plaintiffs by a corporate customer ('the company') on account of moneys advanced to the company. The defendant's liability was 25% of the total amount due. The plaintiffs demanded in writing from the defendant the payment of $1.25m being the defendant's liability on his proportionate 25% share of the total amount due. The plaintiffs applied under a notice for further directions for the defence to be struck out under O 18 r 19 on the ground that it disclosed no reasonable defence, was frivolous or vexatious, and an abuse of the process of the court. The assistant registrar ordered that the defence be struck out under O 18 r 19. The defendant's appeal was essentially based on technicalities. A number of grounds of appeal were raised. The main ground was that the certificate relied upon by the plaintiffs was not in accordance with cl 6(c) of the guarantee under which it had been issued. The defendant contended that the certificate was not issued in accordance with cl 6(c), and was therefore ineffective, because the words 'for the time being' in the clause meant that the certificate must certify the amount due and owing by the defendant to the plaintiffs on the date of issuance of the certificate or, at least, the amount certified must be 'contemporaneous' with the date of the certificate.

Held, dismissing the appeal:

(1) A closer examination of the numerous other examples in *Stroud's Judicial Dictionary* of the usage of the term 'for the time being' appears to indicate that, in denoting single periods of time, there is no reason why the term should not be used to refer to facts or events in the past.

(2) By its very nature, a certificate issued by a bank to certify an amount due to it 'for the time being' never refers to an amount which may be owing in the future, but to an amount due to it at a date, present or past, to which reference is being made.

(3) The fact is that in business and commerce, there are many instances when provisions are inserted into contracts by which the contracting parties agree that a designated person will have the power to issue a certificate as evidence of a fact, and the issue by him of the certificate is then conclusive evidence of that fact, as between the parties.

(4) The widespread use by banks of 'conclusive evidence' clauses has arisen simply because of the dictates of commerce. What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 11 of 1990.]

Cases referred to

1 *Ellison* v *Thomas* 46 ER 7 (distd)
2 *Bache & Co (London) Ltd* v *Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437 (folld)
3 *Dobbs* v *National Bank of Australasia Ltd* (1935) 53 CLR 643 (folld)
4 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)
5 *Papua and New Guinea Development Bank* v *Manton* [1982] VR 1000 (refd)

RE Martin (*J Benny* with him) for the appellant/defendant.
Sarjit Singh Gill for the respondents/plaintiffs.

Cur Adv Vult

Yong Pung How J: The plaintiffs are a bank incorporated in Thailand and having a place of business in Singapore. By a guarantee in writing dated 21 December 1982 ('the guarantee'), the defendant and two others severally guaranteed the payment of any outstanding liability due to the plaintiffs by a corporate customer ('the company') on account of moneys advanced to the company up to the tune of $5m; it also included the payment of any liabilities of the company on account of interest, commissions and banking charges relating thereto, together with interest thereon at the rate of 4% pa above the plaintiffs' prime lending rate from the date of default. The defendant's liability was 25% of the total amount due.

On 15 August 1986, the outstanding amount due and owing by the company to the plaintiffs was $4,981,712.10. On that day, on the instructions of the plaintiffs, their solicitors demanded in writing from the defendant the payment of $1.25m being the defendant's liability on his proportionate 25% share of the total amount due. As the defendant failed to respond to the demand, a writ was issued on 2 October 1986. The accompanying statement of claim stated that as at 15 August 1986, the outstanding amount due and owing by the company to the plaintiffs was $4,981,712.10 and claimed the payment of $1.25m as the defendant's proportionate share under the guarantee. After effecting substituted service on the defendant, the plaintiffs made an application on 17 January 1987 under O 14 for summary judgment to be entered against the defendant for $1.25m with interest at 8% pa and costs.

The defendant opposed this application on the ground that, although in 1982 he had set up the company together with the other two guarantors, he had been removed as a director in early 1986. The other guarantors had taken over the control of the company and had mismanaged its affairs, resulting in the default.

On 3 July 1987, the deputy registrar ordered that judgment be entered against the defendant for $1.25m with interest at 8% pa from 2 October 1986 until the date of payment. On 7 July 1987, the defendant applied for a stay of execution. He merely claimed in his supporting affidavit that there was a triable issue but did not set out the grounds of his application in detail. The application was dismissed on 7 August 1987 and on 18 August 1987 judgment was duly entered against the defendant.

On 7 July 1987, however, the defendant had also appealed to the judge of the High Court in chambers against the deputy registrar's decision. The appeal was heard on 7 October 1987. The defendant was granted unconditional leave to defend the action, and the deputy registrar's decision in entering judgment was set aside.

On 26 October 1987, the defendant filed a defence. This claimed, inter alia, that the liability of the company was by way of a term loan under a loan agreement dated 21 December 1982 ('the loan agreement'), and that the repayment by the company of the term loan was subject to the completion of the project for which the loan had been made, and to the finalization of the loan account. As the project had not been completed by then, the liability of both the company and the defendant had not crystallized and there was therefore no liability on the part of the defendant.

On 11 March 1989, the plaintiffs applied under a notice for further directions for the defence to be struck out under O 18 r 19 on the ground that it disclosed no reasonable defence, was frivolous or vexatious, and an abuse of the process of the court. In a supporting affidavit dated 28 March 1989, the plaintiffs' solicitors averred that the defence filed on 26 October 1987 offered no defence at all to the plaintiffs' claim. The affidavit exhibited a certificate dated 27 March 1989 under cl 6(c) of the guarantee certifying that on 16 August 1986 a sum of $4,981,712.10 was due and owing by the company. It was contended by

the plaintiffs that under cl 6(c) any certificate issued pursuant to it would be binding and conclusive on the defendant as a guarantor.

When the application was heard on 17 April 1989, the assistant registrar ordered that the defence be struck out under O 18 r 19 and under the inherent jurisdiction of the court, and that the plaintiffs be at liberty to enter judgment against the defendant for $1.25m together with interest thereon at 8% pa from 2 October 1986 until judgment, and with costs up to and including the application. On the same day, the defendant gave notice of appeal to the judge of the High Court in chambers against the assistant registrar's decision, seeking that it be reversed, and that the plaintiffs' notice for further directions be dismissed.

On 17 October 1989, the defendant's appeal was heard by me and dismissed; but I varied the assistant registrar's order, so that the costs of the action prior to the production of the relevant certificate issued on 27 March 1989 should go to the defendant. At the defendant's request, further arguments were heard by me on 14 November 1989 as a preliminary step to an appeal to the Court of Appeal under s 34(b) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed). After hearing the further arguments, I remained of the view that the defence was obviously unsustainable because there was no real defence, and accordingly that recourse could properly be had to the summary process under O 18 r 19. I therefore confirmed the earlier dismissal, and now set out my grounds of decision.

The defendant's appeal was essentially based on technicalities. A number of grounds of appeal were raised. It was contended, for example, that the intention to use a certificate issued under a 'conclusive evidence' clause in the guarantee had not been pleaded, notwithstanding that evidence should not be pleaded at all. Similarly, it was contended that the certificate should have been issued before the commencement of legal proceedings, but in my judgment there was no merit whatsoever in this contention. The main ground, however, was that the certificate relied upon by the plaintiffs was not in accordance with cl 6(c) of the guarantee under which it had been issued.

Clause 6(c) of the guarantee provided as follows:

> Any admission or acknowledgement in writing by the customer or any person on behalf of the customer of the amount of the indebtedness of the customer or otherwise in relation to the subject matter of this guarantee or any judgment or award to the bank against the customer or proof by the bank in bankruptcy or companies winding up which is admitted or any certificate by an officer of the bank as to the moneys and liabilities for the time being due and remaining or incurred to the bank from or by the customer or a copy of the account of the customer contained in the bank's book of account signed by any officer of the bank shall be binding and conclusive evidence on the guarantor in all courts of law and elsewhere.

The plaintiffs' certificate under cl 6(c) was as follows:

> 27 March 1989
> Our Ref: CAD CORR 89/0414 (AL)
>
> To Whom It May Concern
>
> Dear Sir
>
> Re: Banking facilities
> Outstanding
>
> We confirm that as (sic) 16 August 1986 there was a sum of $4,981,712.10 due and owing from Brighton Project Pte Ltd to us.
>
> Yours faithfully
> Kamriang Timaphorn
> Vice President
> Branch Manager
> AL/vl

The defendant contended that the certificate was not issued in accordance with cl 6(c), and was therefore ineffective, because the words 'for the time being' in the clause meant that the certificate must certify the amount due and owing by the defendant to the plaintiffs on the date of issuance of the certificate, ie 27 March 1989, or, at least, the amount certified must be 'contemporaneous' with the date of the certificate. By 'contemporaneous' in the context of his argument, the defendant meant that the term could also bear a wider and more liberal construction, ie it could also mean 'in the same period' and not necessarily 'occurring at the same time'. In this case, the amount certified was the amount due and owing on 16 August 1986 which was two and a half years earlier and which, the defendant contended, was too long ago to be considered as being contemporaneous. The defendant also contended that, in any case, the certificate was inaccurate on its face.

The defendant's counsel referred the court to *Stroud's Judicial Dictionary*, Vol 5 (5th Ed) at p 2640 and to the old English case in 1862 of *Ellison* v *Thomas*[1] at p 11 to show that the term 'for the time being' in clause 6(c), even when used in a general sense, could only refer to 'an indefinite state of facts which will arise in the future', and could not possibly refer to facts in the past. I do not think *Ellison* v *Thomas*[1] showed this at all. In that case, money was directed by a settlement to be raised after the death of the survivor of two persons to be held in trust for all the children of the tenant for life of certain hereditaments settled by a contemporaneous deed, other than the eldest son 'for the time being' entitled under the last mentioned settlement. It was held that the exclusion applied only to the person who was the eldest son at the time appointed for raising the money, and that the representatives of an eldest son who had died before that period were entitled to participate in the money. In this case, the term 'for the time being' happened to be used to refer to the future, and what the court decided was that it referred in that case to the position at a certain point in time and not to other similar positions 'from time to time'. The Lord Chancellor, Lord Westbury said at p 11:

> When a future period is referred to, and it is desired to designate the person who fills a particular character at that period, the words 'for the time being' are appropriately used. If several future periods are referred to the words are again appropriate, and may denote several different persons who may in succession fill the character at such several periods. If I say that when a particular office shall become vacant, the appointment shall belong to the Prime Minister for the time being, the words denote one person only, for one period only is referred to; but if, as in the instance put by the Vice-Chancellor, I direct a certain sum to be paid annually to the rector of A, for the time being, the words denote the rectors from time to time, because they refer not to the time of one payment, but to the times of successive annual payments.

It is clear, however, as can be seen later from other examples, that the whole of the above passage could be changed to refer to situations in the past.

A closer examination of the numerous other examples in *Stroud's* of the usage of the term also appears to indicate that, in denoting single periods of time, there is no reason why the term should not be used to refer to facts or events in the past. It is essentially a question of the context in which the term is used and whether any words have been used to limit or qualify it. Thus, 'trustees for the time being' is a term which can clearly be used to refer to trustees in some past period of time; so with the use of the term in the sentence '... for many years now, it has been the invariable practice in the service that the officers for the time being holding acting positions should be confirmed in the substantive positions as and when vacancies have arisen'; and it has been common practice in banking to use terms such as 'the amount for the time being secured' or 'the amount for the time being due by the customer to the bank' to refer to an amount owing to the bank at a certain point in time. By its very nature, a certificate issued by a bank to certify an amount due to it 'for the time being' never refers to an amount which may be owing in the future, but to an amount due to it at a date, present or past, to which reference is being made.

The fact is that in business and commerce, there are many instances when provisions are inserted into contracts by which the contracting parties agree that a designated person will have the power to issue a certificate as evidence of a fact, and the issue by him of the certificate is then conclusive evidence of that fact, as between the parties. In the case of banks, there is nothing to prevent them recovering from a customer by leading evidence in court in the normal way to prove the actual indebtedness to them of the customer. They can then recover in full what is owing to them without the production of any certificate. But banks have huge numbers of customers, and over the years a practice has been developed and adopted by all banks by which a 'conclusive evidence' clause is inserted in all loan documentation. This enables the bank to produce a certificate by a designated officer to dispense with such proof, and to be conclusive evidence of the indebtedness of the customer.

The widespread use by banks of 'conclusive evidence' clauses has arisen simply because of the dictates of commerce, and has been supported by the assumption that money institutions, which are themselves closely regulated by the law, are completely honest and reliable. In *Bache & Co (London) Ltd* v *Banque Vernes et Commerciale De Paris SA*,[2] Lord Denning MR said at p 440:

> I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

An examination of the case authorities and the published precedents shows that there is some considerable variety and variation in the wording of conclusive evidence clauses. In *Dobbs* v *National Bank of Australasia Ltd*,[3] the clause provided that a certificate signed by the manager or acting manager for the time being of the office at which the debtor's account was kept should be conclusive evidence of his indebtedness at the date of the certificate. A certificate issued under such a clause need not refer to time or place and, in the absence of fraud, would be conclusive evidence of the date and the amount of indebtedness that it certified as any mistakes in the figures can be remedied by subsequent proceedings: *Bache & Co (London) Ltd* v *Banque Vernes Et Commerciale De Paris SA*.[2] In *Citibank NA* v *Ooi Boon Leong & Ors*,[4] the Federal Court in Malaysia held that the guarantors were bound by the contract to accept a certificate issued by a bank officer under a similar clause as to the liabilities for the time being due to the bank by the customers.

In the instant case, the defendant's attack on the certificate was on the ground that it was issued by the plaintiffs on 27 March 1989 to certify the amount due and owing on 16 August 1986 which was a date two and a half years earlier than the date of the certificate. The plaintiffs contended that the certificate has been issued to certify the amount due at an earlier date, because para 2 of the statement of claim had contained the following claim:

> As at 15 August 1986, the outstanding amount due and owing by the company to the plaintiffs is S$4,981,712,10.

Accordingly, the certificate issued on 27 March 1989 had referred to the amount due on 16 August 1986, because this was what was in the statement of claim and therefore what the plaintiffs had to prove. I see nothing wrong with this procedure, if the plaintiffs were content to claim only the amount due on 16 August 1986 and to forgo any claim for the period after that. So long as the certificate states a date and the amount due and owing as at that date, it is conclusive evidence of the amount due and owing 'for the time being' at the date mentioned in the statement. In that sense, the position is no different from that in *Papua and New Guinea Development Bank* v *Manton*.[5] In that case, the creditor bank tendered in evidence at the trial itself a certificate dated 21 September 1981 to certify the amount due and owing as at 23 September 1974.

In actual practice, there is usually a considerable period of time between the filing of the statement of claim and the entry of judgment, during which interest is still accumulating; also, in some cases, part payments are made during this period towards the reduction of the debt. Since a certificate issued under a 'conclusive evidence' clause is evidence to prove a debt which is not constant but changes day by day, certificates invariably refer not only to the amount of the debt at the time the statement of claim was filed, but also to the amount at the latest available date at which the debt can be crystallized for judgment to be entered. A practical significance in finally settling on a figure for the debt is that the rate of interest receivable changes from the contractual rate to a possible rate under the Civil Law Act (Cap 43, 1988 Ed) and to another rate under O 42 r 12 of the Rules of the Supreme Court 1970. In my judgment, there is no reason why the plaintiffs cannot issue updated certificates, if need be. This is a common practice, and is done all the time.

Appeal dismissed.

Solicitors: *Ramdas & Wong; Joseph Tan Jude Benny & Co; Shook Lin & Bok.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Minister of Labour, Malaysia v Lie Seng Fatt

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 93 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND AJAIB SINGH SCJJ
3 MARCH 1990

Administrative Law — Certiorari — Application to quash decision of Minister of Labour — Minister deciding not to refer dispute to Industrial Court — Discretion of minister — Industrial Relations Act 1967, s 20

Labour Law — Referral to Industrial Court — Minister refusing to refer dispute to Industrial Court — Application for certiorari — Industrial Relations Act 1967, s 20

The respondent in this case had been employed by Koperasi Belia Bersatu Bhd and had held the post of general manager of the company. On 13 November 1986, his appointment as general manager was terminated and he was transferred back to Kin Kwok Daily News Sdn Bhd, a subsidiary of the company. He was dissatisfied with this change and he lodged a complaint to the Director General of Industrial Relations. The matter was referred to the minister who decided that the matter was not fit to be referred to the Industrial Court. The respondent applied for certiorari to quash the decision of the minister and this was granted in the High Court. The minister appealed.

Held, allowing the appeal:
The minister has a discretion under s 20(3) of the Industrial Relations Act 1967 and so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise, he has complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious as the complaint in this case was.

[Responden di dalam kes ini telah diambil kerja oleh Koperasi Belia Bersatu Berhad dan ia telah memegang jawatan sebagai pengurus besar syarikat itu. Pada 13 November 1986, perlantikannya itu telah ditamatkan dan ia telah dipindah balik kepada Kin Kwok Daily News Sdn Bhd, anak syarikat syarikat itu. Ia tidak berpuashati dengan pertukaran itu dan telah membuat aduan kepada Ketua Pengarah Perhubungan Perusahaan. Perkara itu telah dirujukkan kepada menteri dan beliau memutuskan bahawa perkara itu tidak layak dirujukkan kepada Mahkamah Perusahaan. Responden telah memohon certiorari untuk membatalkan keputusan menteri dan ini diperkenankan oleh Mahkamah Tinggi. Menteri telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:
Menteri mempunyai budibicara di bawah s 20(3) Akta Perhubungan Perushaan 1967 dan selagi beliau menjalankan budibicaranya tanpa motif yang tidak jujur, penggunaan budibicara tidak boleh diganggu oleh mahkamah kecuali jika beliau menyalah arah dirinya dari segi undang-undang atau telah mengambilkira perkara-perkara yang tidak berkaitan atau tidak mengambilkira perkara-perkara yang berkaitan atau keputusannya itu berlawanan dengan tujuan statut itu. Selain dari itu beliau mem-